MOTION FILED

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No. 97-1028

In the

Supreme Court of the United States

October Term, 1997

JOE A. MACRI; LOUISE MACRI;
JOE F. MACRI; and ELEANOR MACRI,
Petitioners,

v.

KING COUNTY, a political
subdivision of the State of Washington,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, THE CALIFORNIA FARM BUREAU FEDERATION, THE OREGON BUILDING ASSOCIATION, AND THE WASHINGTON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS, MACRI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, THE CALIFORNIA FARM BUREAU FEDERATION, THE OREGON BUILDING ASSOCIATION, AND THE WASHINGTON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS, MACRI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself, the Building Industry Association of Washington, the California Farm Bureau Federation, the Oregon Building Industry Association, and the Washington Association of REALTORS®.[1] Consent to file this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, King County, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICI CURIAE

The Building Industry Association of Washington (BIAW) is a trade association representing more than 7,300 members engaged in commercial and light industrial construction and the building of most of Washington's residential housing. Many of BIAW's members frequently make application to the government for approval of development projects. If the government is free to act

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

irrationally so long as it pays compensation, its members will have lost a valuable constitutional protection.

The California Farm Bureau Federation (Farm Bureau) is a nonprofit, voluntary membership corporation organized under the laws of the State of California for the purpose of fostering agriculture and working to resolve those problems facing the agricultural community. Its members are 53 county farm bureaus through which it represents nearly 80,000 families in 56 California counties and more than 80% of the commercial farmers in the State of California.

California farmers are constantly faced with serious overregulation from governmental agencies having authority over some of their land use activities. For example a substantial number of the Farm Bureau's members conduct agricultural activities on farmlands that contain habitat for protected wildlife and plant species. These activities are subject to regulation by state and federal agencies under the state and federal Endangered Species Acts. Also, many members conduct agricultural activities on farmland characterized as wetlands that are subject to regulation under the state and federal Clean Water Acts. Farm Bureau members' farming activities have been seriously overregulated under these and other statutes by governmental agencies' arbitrary and capricious actions. For example, in some cases the government has prohibited the planting of crops on agriculturally zoned lands and even dictated how the land may be used for livestock grazing. In other cases, the government has created new zoning classifications that require agricultural landowners to take land out of production to feed and shelter wildlife. These actions violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution yet, under the Ninth Circuit's decision in this case, Farm Bureau members

have no right to challenge these wrongs for violating their due process rights. This denial of their rights severely diminishes opportunities for meaningful constitutional relief.

The Oregon Building Industry Association (OBIA) represents the interests of 5,200 builders, developers, and contractors in the State of Oregon. OBIA works with its local associations to meet the housing needs and quality of life for all Oregonians. Like BIAW, OBIA is concerned that the Ninth Circuit's decision in *Macri* will allow governments to act arbitrarily in the processing of its members' land use applications.

The Washington Association of REALTORS® represents 16,000 independent real estate agents and brokers in the State of Washington. The Association works to promote the success of its members through advocacy of a favorable legislative climate, coordination of uniform professional standards enforcement, identification of resources required to meet the needs of the marketplace, and various communication efforts. In this case, the Association seeks to ensure that there is a legal climate which protects the rights of property owners from arbitrary and capricious government regulatory actions.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principle office in Sacramento, California, with other offices in the States of Washington, Hawaii, and Florida. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any

contemplated legal action and authorizes such action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Amici seek here to augment the argument in the petition for writ of certiorari by providing evidence of additional conflicts and confusion among the circuits. Additionally, PLF will address the inadequacy of just compensation as a remedy, the textual and historical underpinnings of the Due Process Clause, and establish that this Court has consistently applied substantive due process protections to property owners. PLF's public policy perspective and litigation experience in support of private property rights and individual rights will provide an additional viewpoint with respect to the constitutional issues presented. In particular, PLF is concerned that the Ninth Circuit's decision in this case denies individuals access to the federal courts to seek relief against irrational, arbitrary, and capricious government actions effecting their property.

For the foregoing reasons, amici request this Court to grant their motion to file the attached amicus curiae brief.

DATED: January __, 1998.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Graham v. Connor*, 490 U.S. 386 (1989), require that the remedy of just compensation under the Takings Clause of the Fifth Amendment replace and preclude substantive due process claims under the Fourteenth Amendment based on arbitrary and capricious government interference with property?

2. If a claim for relief based on arbitrary and capricious government action interfering with property may only be based on the Fifth Amendment's Takings Clause, is such a claim unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985), until the property owner seeks compensation under available state procedures?

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INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

The respondent, King County, denied the Macris' preliminary plat application to subdivide their property into 11 residential lots. Approximately four years later, the King County Superior Court held the denial of the application was arbitrary and irrational on its face and in disregard of the facts and circumstances of the Macri proposal.

Subsequently, the Macris filed this action in state court claiming violations of Washington law and seeking damages under 42 U.S.C. § 1983 for a violation of their substantive due process rights stemming from the arbitrary and capricious denial of their plat application. The Macris also raised a Fifth Amendment takings claim alleging the county denial of their plat application failed to substantially advance a legitimate governmental interest. King County removed the action to federal district court where it was dismissed. An appeal was brought before the Ninth Circuit which affirmed the district court.

The opinion of the Ninth Circuit is reported at *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997). Among other things, the court held that the Macris' constitutional claims were limited to review under the Fifth Amendment's Takings Clause because it provides an explicit constitutional source of protection for the petitioners. The court stated that "substantive due process has no place in this context." The court relied on its own prior opinion in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), which held that when an explicit textual

provision of the Constitution protects against the government action, the claim must be analyzed under that specific provision alone and not under the general guarantee of substantive due process. *Armendariz* overruled the Ninth Circuit's opinion in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), in which the court recognized both a takings and due process claim. The court overruled *Sinaloa* based upon this Court's opinions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994). In those cases, the Supreme Court held that claims that law enforcement officials used excessive force or made an arrest without probable cause are properly analyzed under the Fourth Amendment and not the Due Process Clauses of the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The Ninth Circuit has applied this Court's rulings in *Graham* and *Albright* to destroy all substantive due process protections for property rights, thereby adding to a substantial conflict among the circuits. In addition to the Ninth Circuit, the Tenth Circuit prohibits substantive due process claims where the government has acted arbitrarily or capriciously in interfering with property interests. At least four other circuits take a contrary view. This conflict is widespread and well recognized. It is time that this Court harmonize the differing and irreconcilable opinions among the circuit courts of appeals.

This Court should determine whether the substantive component of the Due Process Clause applies to arbitrary and capricious government action affecting property rights. The Ninth Circuit's limited remedy of compensation under the Fifth Amendment Takings Clause is inadequate relief for "improper" government conduct. Moreover, the Constitution expressly provides due process protections for property interests. Indeed, nothing in the language of the Constitution or in its historical

underpinnings suggests that a specific constitutional protection precludes a more general protection. In fact, this Court has consistently recognized a substantive due process protection for property rights. Therefore, this Court should grant the petition for review and reverse the Ninth Circuit opinion in *Macri*.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ADDRESS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS

There is a clear and widespread conflict among the circuits over the main issue in this case: whether *Graham* prohibits substantive due process protections for property interests.

This conflict is well recognized. As noted by the Sixth Circuit: "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). Professor Krotoszynski of the Indiana University, Indianapolis School of Law, agrees:

> In addition to the Ninth and Eleventh Circuits, several other courts of appeals have addressed . . . the question whether substantive due process protects property interests. Even at the most basic level, there is a remarkable

> inconsistency regarding whether substantive due process protects property interests.

Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 577 (1997).

Equally remarkable, however, is the fact that this Court has yet to deal with the issue:

> Although the Supreme Court has on occasion held that the specific constitutional protection supersedes the more generalized due process protection, it has not ruled on whether the specific takings clause of the Fifth Amendment supersedes the general due process provisions of the Fifth and Fourteenth Amendments.

Pearson v. City of Grand Blanc, 756 F. Supp. 314, 317 (E.D. Mich. 1991).

Attesting to the need for Supreme Court resolution of this issue is the Sixth Circuit's lament in *Pearson*:

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.

Pearson, 961 F.2d at 1220 n.45.

A. The Third, Sixth, Eleventh, and District of Columbia Circuits Recognize Substantive Due Process Protections for Arbitrary and Capricious Government Actions Affecting Property Interests

The Ninth Circuit's denial of substantive due process protections for property interests is in direct conflict with most of the other circuits that have considered the issue.

The Third Circuit acknowledges that under some circumstances landowners have substantive due process protections for their property interests. In *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), the court approved a substantive due process claim where a local zoning board allegedly reached an irrational decision that an automobile repair shop violated zoning ordinances. The court emphatically concluded:

> Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 601.

The Third Circuit also allowed a substantive due process claim where the government denied a building permit because of the political activities of the applicant. *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

The Sixth Circuit agrees with the Third Circuit, approving the use of substantive due process to challenge arbitrary or irrational governmental actions. The Sixth Circuit expressly authorizes property owners to challenge adverse zoning decisions under a substantive due process theory. *See LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1111 (6th Cir. 1995) (holding that a substantive due process claim may be stated where government conduct "shocks the conscience"). *See also Pearson v. City of Grand Blanc*, 961 F.2d at 1220-22 (recognizing implication of a substantive due process right for arbitrary refusal to grant rezoning request).

Likewise, the Eleventh Circuit recognizes a separate substantive due process claim for arbitrary and capricious governmental action affecting property interests. In *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997), certain landowners filed a substantive due process action against the county contending the county acted arbitrarily in rezoning the landowners' property to prohibit high-density apartment complexes to which the landowners claimed a vested right. Although the Eleventh Circuit held the county had not acted arbitrarily and capriciously, the court concluded:

> A landowner's vested rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due process protections under the federal Constitution.

Id. at 614.

Finally, District of Columbia Circuit precedent also conflicts with the Ninth Circuit. In *Tri County Industries v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997), a builder brought a substantive due process claim challenging the District of Columbia's refusal to issue a building permit. The court considered an argument based on *Graham* and *Albright*--that the Takings Clause subsumes a substantive due process claim--but, contrary to the Ninth Circuit, the District of Columbia Circuit flatly rejected that argument and held:

> [I]n this circuit at least, under *Silverman*, the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition.

104 F.3d at 459. *Also see Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988).

B. The Tenth Circuit Agrees with the Ninth Circuit in Not Recognizing Substantive Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests

In addition to the Ninth Circuit, the Tenth Circuit does not recognize substantive due process protections for property interests. The Tenth Circuit goes beyond the Ninth Circuit, however, and would subsume the Equal Protection Clause into the Takings Clause. In *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996), a property owner challenged the city's finding of noncompliance with zoning under the Takings, Due Process, and Equal Protection Clauses. The Tenth Circuit relied upon its earlier holding in *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991), and this Court's holdings in *Graham* and *Albright,* to conclude that both the substantive due process *and* equal protection claims are subsumed into the Takings Clause.[1]

C. The Fifth and Seventh Circuits Are Inconsistent in Their Recognition of Due Process Protections for Arbitrary and Capricious Actions Affecting Property Interests

Adding to the confusion among the circuits is the position taken by the Seventh Circuit. In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), a property owner brought a substantive due process action against two public officials for denial of his liquor license and occupancy permit applications. The circuit court acknowledged a substantive due process claim, but with a caveat:

> [A] substantive due process claim based on a state-created property interest is cognizable

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[1] The Ninth Circuit apparently does not subsume the Equal Protection Clause into the Takings Clause. *Armendariz v. Penman*, 75 F.3d at 1326.

> where a plaintiff claims either a violation of some other substantive constitutional right or that the state law remedies are inadequate.

883 F.2d at 558.

This view of substantive due process property protections is directly contradictory to that of the Ninth Circuit in this case. The Ninth Circuit holds that if a property owner suffers a deprivation of some other constitutional right, such as a taking, the substantive due process protections are subsumed into that right. In contrast, the Seventh Circuit in *Polenz* requires some other constitutional deprivation before it would apply substantive due process protections.

Though it never overruled *Polenz*, the Seventh Circuit has not always adhered to it. *See National Paint & Coatings Association v. City of Chicago,* 45 F.3d 1124, 1129 (7th Cir. 1995) ("[o]nly laws that affect 'fundamental rights' come within the purview of [substantive due process]"). Judge Posner in *Gamble v. Eau Claire County,* 5 F.3d 285 (7th Cir. 1993), suggested that substantive due process review for arbitrary government actions is available even in the absence of the *Polenz* factors. In *Gamble*, a property owner applied to the government for the necessary permits to operate a convenience store, gas station, and repair shop. The county initially approved the application, but then revoked its approval after complaints from the neighbors. The Seventh Circuit rejected the property owner's federal civil rights suit because she failed to pursue her state judicial remedies. In doing so, however, the court noted that there is a difference between a takings claim and a substantive due process claim:

> Statutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the

> public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause. When land is taken for a private rather than public use, a rational basis for the government's action, it may be argued, is lacking. The fact that the landowner has an alternate right, one to just compensation, need not be decisive.

5 F.3d at 287 (citations omitted).

At one time, the Fifth Circuit used an approach similar to the Seventh Circuit's approach in *Polenz*. *See Schaper v. City of Huntsville,* 813 F.2d 709, 716-18 (5th Cir. 1987). However, in *FM Properties Operating Company v. City of Austin*, 93 F.3d 167 (5th Cir. 1996), the Fifth Circuit restated the right to be free from arbitrary government action affecting property interests without requiring the violation of some other "fundamental right." The court noted:

> [I]f such government action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," [it may] be declared unconstitutional.

Id. at 174.

This conflict among the circuits touches on fundamental rights expressly protected by the Constitution. The exercise of these rights should not depend on where one lives. The citizens of this country are entitled to a consistent application of the law, especially as it pertains to life, liberty, and property. It is time for this Court to address the questions presented in this case and resolve the substantial conflict among the circuits.

II

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE WHETHER THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE PROVIDES ANY PROTECTION AGAINST ARBITRARY AND CAPRICIOUS GOVERNMENT ACTION AFFECTING PROPERTY INTERESTS

This Court has never applied *Graham* and *Albright* to preempt substantive due process claims outside of cases involving Fourth Amendment protections against alleged improper law enforcement conduct. Rather, this Court has indicated that *Graham* and *Albright* should be read narrowly. *United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997). Therefore, under this Court's precedent, outside of law enforcement cases, the general rule of *Soldal v. Cook County*, 506 U.S. 56, 62-63 (1992), should still apply: improper government conduct may be protected under more than one provision of the Constitution.

However, the Ninth Circuit has held that the only constitutional relief property owners have for arbitrary and capricious government regulations which deprive them of their property rights is compensation under the Fifth Amendment Takings Clause. *Macri v. King County,* 110 F.3d at 1499; *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Armendariz v. Penman*, 75 F.3d at 1325-26; *Sinclair Oil v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996). These cases denied the property owners any relief under the substantive component of the Due Process Clause. What this means to property owners in the Ninth Circuit is that lower federal courts will recognize no constitutional basis to invalidate, enjoin, or award damages for improper government interference with property interests apart from compensation for a taking. Such a position departs

from the textual protection of property in the Fifth and Fourteenth Amendments and from this Court's long-standing recognition of due process protections against arbitrary and capricious government actions. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 390-95 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

A. The Fifth Amendment Remedy of Just Compensation Provides Inadequate Relief for Arbitrary and Capricious Government Land Use Regulations

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court made clear that the constitutionally required relief for a Takings Clause claim is compensation:

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is not designed to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the

> "constitutional obligation to pay just compensation."

482 U.S. at 314 (emphasis in original; citations omitted).

This Court emphasized in *First English* that the purpose of the Takings Clause is to secure compensation in an otherwise "proper" interference with property rights. However, the Takings Clause does not address relief for an "improper" interference with property interests. Under *First English*, once an interference is found, it is up to the government whether to take action to stop that interference or pay compensation:

> Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

482 U.S. at 321.

Accordingly, under *Macri*, a property owner's only constitutional relief for government interference with property interests is through the Takings Clause and the only remedy under the Takings Clause is compensation. Thus, arbitrary and capricious government interference with property interests is constitutionally unrestricted so long as the government pays compensation.

The inadequacy of the compensation remedy can be illustrated by a hypothetical considered by the Seventh Circuit in *Gamble v. Eau Claire County*, 5 F.3d at 286-87: What would be the remedy if a state passed a law which said the governor could take away a person's home and give it to his brother-in-law? Under the Ninth Circuit's position, compensation is the only remedy because the substantive due process claim is merged into the Takings Clause claim. The Ninth Circuit

would find no constitutional prohibition against this arbitrary and capricious governmental conduct.

B. The Plain Text of the Constitution Provides That a State May Not Interfere with Property Interests Without Due Process

The Due Process Clause of the Fourteenth Amendment is similar to the Fifth Amendment and reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." This language is clear, due process applies equally to life, liberty, and property. Indeed, property *is* a liberty interest:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

Nevertheless, the Ninth Circuit has read the prohibition against deprivation of property without substantive due process out of the Constitution. In *Armendariz v. Penman*, which the Ninth Circuit relied on for its *Macri* decision that a specific constitutional claim preempts a general constitutional claim, the plaintiffs alleged a government scheme to deprive them of their property so a shopping center developer could acquire it.

75 F.3d at 1321. In effect, the plaintiffs argued their property was not being taken for a public purpose, but for a private purpose. The Takings Clause prohibits takings for a public use or purpose without compensation. In order to fit the plaintiffs' claim within the Takings Clause, however, the Ninth Circuit had to read the "public purpose" limitation out.

One commentator stated that the Ninth Circuit's approach is now to

> tear constitutional provisions free of their textual moorings in order to shoehorn generalized claims into specific constitutional guarantees.

Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 574.

It is more than a little ironic that the purpose behind the *Armendariz* preemption rule is to prevent resort to open-ended review under the Due Process Clause without textual guideposts. 75 F.3d at 1319. The Ninth Circuit's "shoehorn" approach is potentially even more open-ended than substantive due process review. As Professor Krotozynski states:

> Whatever dangers may be associated with substantive due process review of economic regulation [they] are no more (and arguably less) serious than the dangers posed by the loose form of antitextual interpretivism recommended by *Armendariz*.

Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 574.

The Due Process Clause was included in the Bill of Rights and the Fourteenth Amendment to provide citizens express protection of rights in the ownership of property. But Alexander Hamilton recognized the natural tendency of those

in power to read too much or too little into express constitutional language and so opposed adoption of an enumerated Bill of Rights:

> I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed constitution, but would even be dangerous.

The Federalist No. 84 (Alexander Hamilton).

As Hamilton saw it, the basis for this danger lay in the risk that specific constitutional protections would be read, like the Ninth Circuit did in this case, to limit the rights retained by the people rather than as a constraint on the activities of government. Hamilton argued a bill of rights

> would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id.

Whatever other constitutional rights citizens enjoy, they have a legitimate (and constitutionally cognizable) interest in being free from arbitrary and capricious government action. *See* Krotoszynski, *Fundamental Property Rights*, 85 Geo. L.J. at 577 (citing Judge Kozinski's opinion in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398). The impetus for the American Revolution was to rid the people of the despotism of arbitrary government. To those who pledged their lives, fortunes, and sacred honor to declare their independence, the concepts of life, liberty, and property were not mere abstractions. These revolutionaries saw first hand the consequences of a government that could kill or imprison its citizens and rob the people of their property at will. But to secure the blessings of liberty to their posterity, the Framers of

the Constitution required due process of law. Now, the Ninth Circuit has found a pretext to claim that property rights are protected only by the more narrow Takings Clause of the Fifth Amendment and not by the full weight of the Due Process Clause expressly included in the Fifth and Fourteenth Amendments.

Nothing in the language of the Constitution or in its historical underpinnings suggests that the specific constitutional protection of the Takings Clause addresses the same individual rights as the more general protection of the Due Process Clause. It is axiomatic that the Bill of Rights constitutes a list of *minimum* constitutional protections, not the *maximum*--as the Ninth Circuit seems to suppose. On its face, the Fifth Amendment contemplates two separate protections for property: (1) no person shall be "deprived of life, liberty, or property, without due process of law"; and (2) "nor shall private property be taken for public use without just compensation." The Ninth Circuit seeks to excise an express provision of both the Fifth and Fourteenth Amendments because it finds protection of personal rights in property ownership through both substantive due process and the Takings Clause redundant. However, the two provisions address different concepts of individual rights.

The reference in the Takings Clause to property taken for "public use" suggests that the government may "take" property and pay compensation only for a legitimate governmental purpose. In contrast, when the government interferes with a property interest in an arbitrary and capricious manner, even if it pays, the Due Process Clause should operate to invalidate the action. These clauses are not mutually exclusive. Rather, they provide complementary protections of a broad range of individual rights enjoyed by property owners.

In its decision below, the Ninth Circuit remarks that it had a concern in *Armendariz* for a "loophole" in takings law regarding the ripeness doctrine:

> Namely, by presenting essentially a takings claim under the claim of substantive due process, plaintiffs were able to avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L. Ed.2d 126 (1985). It is axiomatic that a takings violation is not complete until the plaintiff has sought compensation through state remedies and been denied, whereas a substantive due process violation is complete as soon as the government action occurs.

Macri, 110 F.3d at 1499.

What the court characterizes as a "loophole" is simply a correct statement of constitutional jurisprudence. When the government acts arbitrarily to deprive landowners of their property, those landowners *should* be able to rely on the express provisions of the Fifth and Fourteenth Amendments and seek redress for both the arbitrary action and any loss of property rights.

Under Ninth Circuit jurisprudence, the government is not prohibited from acting arbitrarily or capriciously with respect to individual rights in property. Relying on the "whole range of options" available under the Takings Clause, the state may buy its way out of this constitutional obligation. According to the Ninth Circuit, while the government can exercise this "whole range of options," the property owner's only remedy is a forced sale of his property. But this remedy simply does not address the landowners' constitutional right as expressed in the

Due Process Clause and inherent in the Constitution to be free from arbitrary governmental action.

The general rule, that a plaintiff can seek relief under multiple constitutional theories, is the only rule that squares with the express language of the Constitution and the clear intent of the Framers. The Ninth Circuit's exception to this rule for arbitrary actions restricting the use and enjoyment of property disparages a fundamental protection of individual liberty expressly stated in the Fifth and Fourteenth Amendments.

C. This Court Has Consistently Found a Constitutional Right Based on the Due Process Clause to Be Free from Arbitrary Government Actions

This Court has consistently applied a substantive due process rule protecting property owners. It has applied this rule in land use cases even though a takings claim could have been considered along with a substantive due process claim.

> [I]t must be said before the [zoning] ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Village of Euclid v. Ambler Realty, 272 U.S. at 395. *Also see Nectow v. City of Cambridge,* 277 U.S. at 187-88:

> We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter [relative to a zoning ordinance] unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the

> public health, the public morals, the public safety or the public welfare in its proper sense."

This Court has noted in other cases that a landowner has a "right to be free of arbitrary or irrational zoning actions." *See Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977). *See also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

But the Ninth Circuit has carved out an exception to these protections for individual rights in property based on an erroneous extension of this Court's law enforcement rulings in *Graham* and *Albright*. That exception, in effect, is that government is free to act in an arbitrary manner with property owners as long as it pays just compensation for a resulting loss of constitutionally protected rights in the property. That exception is contrary to the precedent of this Court and should be overturned.

CONCLUSION

The Ninth Circuit has applied this Court's rulings in *Graham* and *Albright* to destroy substantive due process protections for property interests. In so doing, the Ninth Circuit has created an additional irreconcilable conflict among the circuits. The Ninth and Tenth Circuits stand on one side of the issue while the Third, Sixth, Eleventh, and District of Columbia Circuits, as well as, arguably, the Fifth and Seventh Circuits, stand on the other side. Only this Court can reconcile this conflict.

Moreover, the Ninth Circuit's ruling is contrary to long-standing practices of this Court and in contravention of the express text of the Constitution which plainly prohibits government deprivation of property interests without full due process of law.

Therefore, amici curiae respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

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Respectfully submitted,

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